

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SIX**

DEAN DAIRY PRODUCTS COMPANY, INC.¹

Employer

and

Case 6-RC-12342

TEAMSTERS LOCAL UNION NO. 261 a/w
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, AFL-CIO²

Petitioner

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

The Employer, Dean Dairy Products Company, Inc., operates a facility that manufactures dairy and dairy-cultured products in Sharpsville, Pennsylvania, where it employs approximately 12 laboratory technician employees.³ The Petitioner, Teamsters Local Union No. 261 a/w International Brotherhood of Teamsters, AFL-CIO, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit of all full-time and regular part-time laboratory employees employed by the Employer at its Sharpsville, Pennsylvania, facility; excluding all production and maintenance employees, warehouse and distribution employees, office clerical employees and guards, professional employees and supervisors as defined in the Act.⁴ A hearing officer of the Board held a hearing and the Employer filed a timely brief with me.

¹ The name of the Employer appears as amended at the hearing.

² The name of the Petitioner appears as stipulated to at the hearing.

³ The Union currently represents the Employer's production and maintenance employees and warehouse and distribution employees at this facility.

⁴ The unit description appears as amended at the hearing.

As evidenced at the hearing and in the Employer's brief, the parties disagree on the following issue: whether laboratory employee Debra Truog is a supervisor within the meaning of Section 2(11) of the Act.

The Employer contends that Ms. Truog does not possess any of the statutory indicia of supervisory status, while the Petitioner contends that Ms. Truog is a supervisor within the meaning of the Act. The Petitioner, contrary to the Employer, seeks to exclude Ms. Truog from voting in a representation election. The unit sought by the Petitioner has approximately 11 employees, while the unit the Employer seeks would include about 12 employees.

I have considered the evidence and the arguments presented by the parties on this issue. As discussed below, I have concluded that Debra Truog is not a supervisor within the meaning of Section 2(11) of the Act and, therefore, is eligible to vote. Accordingly, I have directed an election in a unit that consists of approximately 12 employees.

To provide a context for my discussion of the issue, I will first provide an overview of the Employer's operations. Then, I will present in detail the facts and reasoning that support my conclusion on the issue.

I. OVERVIEW OF OPERATIONS

The Employer manufactures and ships dairy and dairy-cultured products from its facility in Sharpsville, Pennsylvania. At this facility, the Employer employs approximately 12 laboratory employees who provide quality control testing.

The overall operations at the Employer's facility are the responsibility of its plant manager, Roger Wascher. Reporting directly to Wascher are several management personnel, including Jim Detoila, supply chain manager; Annie Plepenhagen, first shift plant superintendent; Doug O'Rock, third shift plant superintendent; John Hogue, sanitation/day off relief; Ed Faylo, cooler superintendent; Keith Chrastina, production scheduler; Matt Kolesar, safety coordinator; Lisa Black, quality control manager; and Dave Laitala, plant engineer. In addition, there are two production supervisors, three cooler supervisors and one maintenance supervisor who are all salaried employees.

The Employer's facility operates 24 hours per day, seven days per week. Raw milk is delivered to the Employer's facility by outside vendors. The raw milk then goes through various processes, depending on the desired final product. Thus, the milk is pasteurized and homogenized. Vitamins, coloring and other additives are mixed into it. The products are then packaged and stored in coolers until shipped to the Employer's customers. The laboratory employees perform quality control tests on the products and the machinery at various stages of the dairy products' manufacturing process.

The laboratory employees are present 24 hours per day, seven days per week. Their hours are staggered so that the employees often overlap each other's shifts. As a result, sometimes there is only one laboratory employee working at a given time, but more often there are two and sometimes three laboratory employees working some of the same hours. As stated previously, Lisa Black is the quality control manager, and is a salaried employee.⁵ Debra Truog, the most senior of the laboratory employees, with about 21 years of experience,⁶ holds the title of laboratory supervisor.⁷ Truog is an hourly employee and receives overtime if she works extra hours.

The quality control department is located in an area adjacent to the production floor. The area is approximately 35 feet by 50 feet. The laboratory employees leave this area to get samples from various parts of the production area, and bring the samples back to be tested on the machinery in their department. The department is divided into three rooms: one room is where testing is done for butterfat content; a second room, called the "plating" room, is where testing is done for bacteria; and the third room, called the incubation room, is where testing is done on yogurt products.

⁵ At the hearing, the parties stipulated, and I find, that Lisa Black is a supervisor within the meaning of Section 2(11) of the Act, inasmuch as she possesses the authority, inter alia, to hire and fire employees.

⁶ The employee in the laboratory with the next highest seniority has about 11 years of experience.

⁷ Lisa Black had held the position of laboratory supervisor before Truog, prior to her promotion to quality control manager.

The laboratory employees are required to perform certain tests at each stage of the production process. Some of the tests are mandated by the Commonwealth of Pennsylvania and some are mandated by the Employer's own standards and policies. The first tests are performed on the raw milk product when it is brought to the facility. These initial tests determine the levels of bacteria, antibiotics, water additives and so forth in the incoming raw milk, as well as the butterfat content. If the levels found in those tests are acceptable, the milk is passed on to the processing stages, where the laboratory employees perform further tests to determine if proper pasteurization and homogenization has occurred. In addition, bacteria and butterfat testing is performed throughout the production process. After the production stage, the laboratory employees test the products during the packaging and cooling process. Some of the tests must be performed every hour or every half hour, while other tests may be required daily or on some other designated time schedule.

To be hired as a laboratory employee, the individual is not required to have any education beyond high school. There is on-the-job training after which a representative of the Commonwealth of Pennsylvania observes the individual performing the tests. The employee receives certification if they successfully perform the testing. The certification has no expiration, so no further observation of testing is required to maintain the certification.

At each step of the production process, tests are performed on the product. If the test results are within acceptable levels, the product is passed on to the next step. If the test shows unacceptable results, then a decision must be made whether to re-work the product, to dump the product, to donate it to a local food bank, or to give it to a local pig farmer to feed his livestock. This decision is based on the type of test performed, the actual test results, and whether the product can still be salvaged for sale. The laboratory employees do not make such decisions; they only pass on the test results to either Lisa Black and/or one of the production managers, who are responsible for making that decision.

There is no schedule developed by management to determine who should perform the various tests on the products. Over time, some employees have assumed responsibility for

specific tests or products. For example, each month employee Carleen Sundy does tests on orange juice products and Truog prepares samples of products to be shipped to Dannon to be tested. Employee Tom Haluska tests the calibration on certain machines regularly, and employee Naomi Bortner does most of the air quality testing. The employees themselves informally divide up the tests that must be performed regularly throughout the day, based on availability. All of the laboratory employees have been trained so that they can perform all of the required tests.

II. DEBRA TRUOG

As previously described, Debra Truog has the most seniority among the laboratory employees, possessing about ten years more experience than the next most senior individual in the department. Truog is paid hourly and earns about \$1.00 more per hour than the next most senior laboratory employee. She holds the title of laboratory supervisor. Truog works a shift on weekdays from 2 a.m. until 10:30 a.m., and on weekends from midnight to 8:30 a.m.. Truog works alone during some of her shift; however, some of the time, particularly in the first few hours in the night, and in the morning during the last few hours of her shift, she overlaps with other employees. Truog spends much of her time performing the same tests as the other laboratory employees. However, in addition, Truog has been given certain administrative responsibilities. She was assigned these duties in part because of her seniority and experience and in part because she is the employee present at the end of the 24-hour daily schedule. Thus, each day, Truog records the totals from the data collected in her department. She is also responsible for placing all of the orders for the department. Much of this work is performed in the early morning before Black is present at the facility. As a result, Truog was issued a key to Black's office because she needs access to the paperwork and computer to perform her administrative duties. She spends between one half-hour and one hour each day doing her paperwork assignments.

Truog also performs “punch checks”, which verify that an employee has worked certain hours that they are claiming. She does not have computer access to payroll information. Because she is present in the early morning, Truog sometimes receives telephone calls from department employees who are calling off for the day. If this occurs before Black is present, Truog calls other department employees to see if they can come into work as a substitute for the day. Likewise, if the work is not completed at the end of a shift, Truog can ask an employee to stay voluntarily past the end of the shift. She has no authority to mandate any employee to work overtime or to come into work as a substitute.

Generally, Black prepares a weekly time schedule for the department employees. On a few occasions, she has asked Truog to make up the schedule. Because the employees have regular shifts that they work each week, preparing the schedule only involves putting in these predetermined shifts, along with any changes, such as vacation days, that were requested and approved in advance by Black. Truog has no authority to change any schedules; only Black has the authority to do this. On at least one occasion recently, Naomi Bortner, along with some other employees in the department, prepared the weekly schedule at Black’s request. All requests for vacation or other days off are given in writing to Black.

Truog, as well as Black and Bortner, is a certified “laboratory director”. This certification was issued by the Commonwealth of Pennsylvania after each individual successfully passed a test. Once certified, the laboratory directors are authorized to sign off on certain forms and test results. Because she is the most experienced department employee, other employees sometimes come to Truog with questions regarding their work. Truog can give advice in these situations but has no authority to instruct an employee to perform any tasks or to re-do any work already performed. Similarly, because of her record-keeping duties, Truog sometimes informs other employees that certain tests still need to be completed, but has no authority to order employees to perform any particular work. If the results of any test are below acceptable standards of the government or the Employer, Truog passes on this information to Black or to

one of the production supervisors. She has no authority to decide what should be done with the product that tested below acceptable levels.

Neither Truog nor any other department employee has any role in interviewing or making decisions about hiring new employees. She, as well as other department employees, has occasionally been asked to give a tour of the facility to applicants or to new hires. Truog has no authority to discipline or recommend discipline of other employees.

III. LEGAL ANALYSIS AND CONCLUSIONS

Before examining the specific duties and authorities of Debra Truog, I will review the requirements for establishing supervisory status. Section 2(11) of the Act defines the term supervisor as:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

To meet the definition of supervisor in Section 2(11) of the Act, a person needs to possess only one of the 12 specific criteria listed, or the authority to effectively recommend such action. Ohio Power Co. v. NLRB, 176 F.2d 385 (6th Cir. 1949), cert. denied 338 U.S. 899 (1949). The exercise of that authority, however, must involve the use of independent judgment. Harborside Healthcare, Inc., 330 NLRB 1334 (2000); Hydro Conduit Corp., 254 NLRB 433, 437 (1981). Thus, the exercise of the indicia listed in Section 2(11) of the Act in merely a routine, clerical or perfunctory manner will not confer supervisory status on the individual. Chicago Metallic Corp., 273 NLRB 1677 (1985). Moreover, employees who are acting merely as conduits for relaying information between management and other employees are not statutory supervisors. Bowne of Houston, 280 NLRB 1222, 1224 (1986).

The burden of proving supervisory status lies with the party asserting that such status exists. NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706, 711-712 (2001); Michigan Masonic

Home, 332 NLRB 1409 (2000). The Board has frequently warned against construing supervisory status too broadly because an employee deemed to be a supervisor loses the protection of the Act. See, e.g. Vencor Hospital – Los Angeles, 328 NLRB 1136, 1138 (1999); Bozeman Deaconess Hospital, 322 NLRB 1107, 1114 (1997). Lack of evidence is construed against the party asserting supervisory status. Michigan Masonic Home, supra at 1409. Mere inferences or conclusionary statements without detailed, specific evidence of independent judgment are insufficient to establish supervisory authority. Sears, Roebuck & Co., 304 NLRB 193 (1991).

Possession of authority consistent with any of the indicia of Section 2(11) is sufficient to establish supervisory status, even if this authority has not yet been exercised. See, e.g. Fred Meyer Alaska, Inc., 334 NLRB 646, 649 (2001); Pepsi-Cola Co., 327 NLRB 1062, 1064 (1999). The absence of evidence that such authority has been exercised may, however, be probative of whether such authority exists. See Michigan Masonic Home, supra at 1410; Chevron U.S.A., 309 NLRB 59, 61 (1992).

With regard to whether Debra Truog possesses any of the 12 indicia of supervisory status listed in Section 2(11) of the Act, it is noted that there is no contention⁸ or record evidence that she discharges, suspends, lays off, recalls, disciplines, transfers, promotes, rewards, adjusts employee grievances or effectively recommends such actions. Accordingly, I will address only the Petitioner's evidence that Truog is a supervisor because of her role in hiring, assigning and directing work of employees.

In considering whether Truog possesses any of the supervisory authority set forth in Section 2(11) of the Act, I note that in enacting this section of the Act, Congress emphasized its intention that only supervisory personnel vested with "genuine management prerogatives"

⁸ Although the Petitioner asserts that Truog is a supervisor, it did not file a brief and declined to make any oral argument. Thus, the Petitioner did not enumerate the specific indicia upon which it was relying in making this assertion. Consequently, I am relying on the indicia suggested by the evidence presented by the witnesses and documents at the hearing to evaluate which of the statutory supervisory indicia the Petitioner is asserting that Truog possesses.

should be considered supervisors, and not “straw bosses, leadmen, set-up men or other minor supervisory employees. Chicago Metallic Corp., supra at 1688. The Board and the courts have recognized that an employee does not become a supervisor merely because he has greater skills and job responsibilities than fellow employees or because he gives some instructions or minor orders. Byers Engineering Corp., 324 NLRB 740 (1997); Chicago Metallic Corp., supra. I conclude, for the reasons discussed below, that the Petitioner has not met its burden of establishing that Truog is a statutory supervisor. Rather, Truog is the type of individual that Congress did not wish to exclude from coverage by the Act.

With regard to hiring, the only role that Truog plays in this process is that, on a few occasions, Truog was asked to give an applicant or a new hire a tour of the facility. Other laboratory employees have been asked to give such tours as well. There was no evidence presented that Truog has any part in interviewing or deciding whether to hire an applicant for employment. The only role she plays is to occasionally give a tour of the facility. Accordingly, I find that the Petitioner has not met its burden of proof to show that Truog possesses the authority to hire or effectively recommend hiring.

With regard to assigning and responsibly directing work, the evidence indicates that Truog sometimes informs other employees that certain tests still need to be performed on a particular day. She is aware of these needs because of her responsibilities to complete paperwork on the test results at the end of the 24-hour period each day. However, there was no evidence presented that Truog has any authority to assign any particular task to an employee. The testimony at the hearing revealed that if Truog suggests to an employee that a certain test needs to be performed, she has no authority to compel an employee to perform such work if they refuse or are too busy to do it.

Truog, as well as Bortner and other employees, have, on rare occasions, made up the weekly schedule for the department, but Truog has no authority to change any shifts without authorization from Black. Truog also writes in call-offs that she receives by telephone when

Black is not present, but has no authority to grant time off or to change the assigned work schedule of any employee. If testing is not completed at the end of a shift, Truog has been authorized to ask an employee to voluntarily work overtime. If the employee will not work overtime, Truog has no authority to mandate overtime.

With regard to the daily assignment of work, the employees in the department select their own assignments. Most of the tests must be done at specific time intervals, and the employees self-select which tests they desire or are available to perform. In some cases, as described previously, individual employees have assumed responsibility for specific tasks that are done regularly. Truog plays no role in making such assignments.

Similarly, the record evidence reveals that Truog is sometimes approached by other employees with questions or problems regarding their work. This occurs because Truog is the most experienced laboratory department employee, and not because she has any authority to direct their work. Truog cannot require an employee to re-do work or to perform the work in a different manner.

The Petitioner provided testimony regarding other aspects of Truog's work that might be argued are secondary indicia of supervisory status. For example, the Petitioner produced evidence that Truog's title is "laboratory supervisor", the title held by Black before her promotion to management. However, the testimony by Truog revealed that, other than the paperwork and record-keeping assignments, Black kept most of her duties when she changed jobs. Moreover, the Board has repeatedly held that the possession of the title of supervisor is not dispositive of supervisory status. See, e.g. Pan-Oston Co., 336 NLRB 305 (2001); MJ Metal Products, 325 NLRB 240, 241 (1997); Riverchase Health Care Center, 304 NLRB 861, 865 (1991); Waterbed World, 286 NLRB 425, 426 (1987), enfd. 974 F.2d 1329 (1st Cir. 1992); Pine Manor Nursing Home, 238 NLRB 1654, 1655 (1978). Therefore, I do not find Truog's title of laboratory supervisor to be indicative of statutory supervisory status.

Some of the other factors that might be argued are evidence of secondary indicia of supervisory status include occasionally signing off on payroll change forms, holding a key to Black's office and performing some administrative duties. However, non-statutory indicia can be used as background evidence on the question of supervisory status but are not themselves dispositive of the issue in the absence of evidence indicating the existence of one of the statutory indicia of supervisory status. Ken-Crest Services, 335 NLRB 777, 779 (2001); Training School of Vineland, 332 NLRB 1412, fn. 3 (2000); Chrome Deposit Corp., 323 NLRB 961, 963 fn. 9 (1997). It is well settled that supervisory status cannot be proven through secondary indicia alone, without the presence of any one of the statutory indicia. North Jersey Newspaper Co., 322 NLRB 394 (1996); Billows Electric Supply, 311 NLRB 878, fn. 2 (1993). Thus, it is unnecessary to further discuss any of the secondary indicia raised by the Petitioner, inasmuch as I have already found none of the statutory indicia to be present.

IV. FINDINGS AND CONCLUSIONS

Based upon the entire record in this matter and in accordance with the discussion above, I find and conclude as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction in this matter.
3. The Petitioner claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time laboratory employees, including the laboratory supervisor, employed by the Employer at its Sharpsville, Pennsylvania, facility; excluding all production and maintenance employees, warehouse and distribution employees, office clerical employees and guards, professional employees and supervisors as defined in the Act.

V. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by Teamsters Local Union No. 261 a/w International Brotherhood of Teamsters, AFL-CIO. The date, time and place of the election will be specified in the Notice of Election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause

since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list containing the full names and addresses of all the eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, Room 1501, 1000 Liberty Avenue, Pittsburgh, PA 15222, on or before **May 27, 2004**. No extension of time to file this list will be granted, except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at 412/395-5986. Since the list will be made available to all parties to the election, please furnish a total of **two (2)** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of Election provided by the Board in areas conspicuous to potential voters for a minimum of three (3) full working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least five (5) full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so precludes employers from filing objections based on non-posting of the election notice.

VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST (EDT), on **June 3, 2004**. The request may **not** be filed by facsimile.

Dated: May 20, 2004

/s/ Gerald Kobell

Gerald Kobell, Regional Director

NATIONAL LABOR RELATIONS BOARD
Region Six
Room 1501, 1000 Liberty Avenue
Pittsburgh, PA 15222

Classification Index

177-8520-0800

177-8520-1600

177-8520-7000

